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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1001

EUGENE KENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1965. On January 5, 1966, Mr. Justice Harlan, extended the time for filing a petition for a writ of certiorari to and including February 12, 1966. The petition for a writ of certiorari was filed on February 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's supplementary instruction, given when the jury reported failure to agree on a verdict, was coercive.

2. Whether the trial court properly responded to the jury's request for clarification of the nature of the charges in the indictment.

3. Whether the government withheld a tape recording of a conversation between two government witnesses.

4. Whether petitioner was properly convicted of violating 18 U.S.C. 201(f).

5. Whether petitioner was properly convicted of aiding and abetting violations of 26 U.S.C. 7214(a)(2).

STATUTES INVOLVED

18 U.S.C. 201(f) provides in pertinent part:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

26 U.S.C. 7214(a)(2) provides in pertinent part:

> Any officer or employee of the United States acting in connection with any revenue law of the United States—
>
> * * * * *

> (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;
>
> * * * * *
>
> shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

STATEMENT

Petitioner was convicted on five counts (counts 23–27) charging that he aided and abetted (18 U.S.C. 2(a)) violations of 26 U.S.C. 7214(a)(2) by inducing Internal Revenue Service employees to receive a fee or reward not prescribed by law. He was also convicted on two counts (20 and 21) charging that he gave money to a Service employee on August 27 and October 22, 1963, otherwise than as provided by law for the proper discharge of his official duties, in violation of 18 U.S.C. 201(f).[1] Petitioner was sentenced to concurrent terms of one year on each count (Tr. 8–9, 71–72).

The evidence showed that petitioner, a certified public accountant, communicated with certain agents of the Internal Revenue Service when audits of his clients' tax returns were imminent. In each instance, he would suggest that the agent obtain the client's tax

[1] The indictment included 29 counts, a number of which were dismissed at the start of trial. Petitioner was acquitted on other counts charging bribery or payments to influence official action.

return.[2] Petitioner would then propose that the agent disallow only a relatively small number of the deductions claimed on the return. The agent would accept this proposal without examination of its merits and would prepare a report in accordance with the agreement, disallowing from $300 to $500. Thereafter, petitioner would surreptitiously give $50 or $75 to the agent (II R. 7–14, 17–26, 27–42, 49–54).

The court of appeals affirmed the conviction, giving detailed consideration to petitioner's claims of error (Pet. App. 1–10).

ARGUMENT

1. Petitioner argues that the trial judge's supplementary instruction, given when the jury reported its inability to agree, exceeded the bounds of the charge approved in *Allen* v. *United States,* 164 U.S. 492, 501. Although the charge is not precisely the same as in *Allen,* we submit that it was not coercive.[3]

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[2] This procedure was irregular because returns were usually assigned to the agents by the group supervisor (Pet. App. 3).

[3] The charge, in full, reads as follows (I R. 47–48):

"Ladies and gentlemen, I have a note which reads, 'Jury hopelessly deadlocked. No change in sight.'

"You know, if you add up the time that you have been deliberating it comes to about forty-five minutes from quarter twelve until one o'clock, and then say roughly from two until now, and if my mathematics are correct, it comes to about three hours and forty-five minutes, which is not one of the world's records for jury deliberation.

"But these things happen and I am going to tell you what the United States Supreme Court said, about one hundred years ago, in a somewhat similar suituation. That court said:

" 'While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows

In giving the instruction, the trial judge was not at all dogmatic in his approach. His opening statement gently chided the jurors for reporting a "hopeless" deadlock so early in their deliberations. The judge's reading of a portion of the opinion in the *Allen* case was certainly not improper. He assured the jurors that they ought not to feel coerced, in language substantially equivalent to saying that they need not relinquish opinions conscientiously held. The judge concluded by emphasizing that the jury's decision, whatever it might be, would be accepted. A fair reading of the instruction in its setting indicates that it

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that opinions may not be changed by conference in the jury room. The very object of the jury system is to seek your unanimity by a comparison of views and by arguments amongst the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to arguments and with a distrust of his own view, his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men who are equal and equally intelligent as himself.'

"I am going to suggest that you think about that and go back and try again. You know, what we all try to achieve is unanimity in these cases. I hope that you can do it. I don't mean by reading this charge to coerce some juror who feels that he or she is of this opinion or that but certainly the advice of the Supreme Court should be heeded.

"It may be that you can agree on some of the counts and not on others, but whatever is the ultimate decision we will accept it.

"I am going to ask you to go back and try again, and if you can't agree, that is it, we have to quit.

"So will you please go back and try again?"

The jury retired, and reported agreement approximately one hour and fifteen minutes later (I R. 48–49).

did not propel the jurors toward a verdict contrary to their convictions.[4]

2. The trial court properly responded to the jury's request for clarification of the charges. Before proceeding, the judge notified counsel of what he thought would be an appropriate instruction (I R. 42):

> The Court: I have a note from the jury which reads, "Require, if possible, a clearer definition of charge in each group and three words, bribery, gratuity and aiding and abetting." So I guess I will have to recharge them. Do you see any other alternative?
>
> Mr. Humphreys [Assistant United States Attorney]: I supposed that is what they mean.
>
> Mr. Keefe [petitioner's attorney]: I don't see any alternative.
>
> The Court: If they have some question about that I will ask them to tell me what part they don't understand.

Defense counsel was thus aware of the judge's intention to recharge the jury; yet, he made no request for, nor did he suggest, any specific instruction. Indeed, he agreed that the trial judge had no alternative but to recharge the jury.

The judge gave the additional instruction in the wording of the original charge, explaining, both at the opening and close of his statement, that if anything remained unclear, the jury should point it out

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[4] This case does not involve the delicately balanced factual situations found in *Stewart* v. *United States*, 300 Fed. 769, 786–787 (C.A. 8), and in *Nigro* v. *United States*, 4 F. 2d 781 (C.A. 8), the cases relied upon by petitioner. There was no question but that petitioner paid sums of money to agents of the Internal Revenue Service.

with particularity (see Pet. 25–26). In his original charge the judge had grouped the counts in a logical arrangement and had carefully defined the elements of each offense. The repetition of those instructions was all that the situation demanded. Petitioner deliberately failed to take exception to the additional charge, although he had the opportunity to do so before and after it was given. Therefore, he has no ground for now claiming error.[5] Rule 30, F.R. Crim. P.

3. There is no merit to petitioner's claim (Pet. 28–31) that the trial judge erred in refusing to allow a hearing to determine whether a tape recording existed of a conversation between an undercover agent, Coady, and another Internal Revenue Service agent, Clyne.

Coady's hotel room had contained electronic equipment for recording conversations. Clyne, one of the Service's employees who engaged in transactions with petitioner, was present in the hotel room on two occasions. A lengthy tape of one of Clyne's conversations with Coady was produced (II R. 55–56; Tr. 270–274). On the final day of the trial, after the government had closed its case and the court had ruled on defense motions, defense counsel stated that his review of Coady's testimony showed that more than one con-

[5] *Powell* v. *United States*, 347 F. 2d 156 (C.A. 9), is not apposite. There, the trial court gave a brief and clearly unresponsive excerpt from its original charge without attempting to ascertain what was troubling the jury. In the present case, the trial judge gave a complete statement of the nature of the charges and impressed upon the jury that he would be willing to answer any questions it might have.

versation with Clyne had occurred in the hotel room. Since only one tape had been produced, counsel stated that he was concerned about a problem under 18 U.S.C. 3500; he indicated that he wished to inquire into it. The Assistant United States Attorney stated that there was no other tape of conversations between Coady and Clyne. The judge refused to pursue the matter further (II R. 57–58; Tr. 307). After the verdict, defense counsel urged that he had been denied producible material (I R. 53–54). The government submitted an affidavit in which Coady stated that the recording device in the hotel room had been activated infrequently, and that the only tape of a conversation with Clyne was the one produced at trial (I R. 69–70). The trial judge denied defense counsel's request to question Coady.

It is apparent that the ruling was not erroneous.[6] The fact that Clyne had been in the hotel room on two occasions does not mean that a second tape existed. Coady's affidavit gave ample assurance that such a tape was not made. Recalling Coady for further testimony would have been pointless. In view of the absence of evidence that a second tape existed, the trial court acted within its sound discretion in refusing to reopen the case. *United States* v. *Sheba Bracelets,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904.

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[6] The government had, in the course of the trial, readily produced extensive material (as to each of the prosecution witnesses) which included statements, reports, grand jury minutes, even confidential personnel reports which were clearly not subject to production under 18 U.S.C. 3500 (Tr. 88, 92–99, 113, 147–149, 156, 168–170).

4. The court below correctly rejected petitioner's argument that "corrupt intent" must be proved as an element of the offense under 18 U.S.C. 201(f) (and petitioner's allied contention that the statute is unconstitutionally vague) (see Pet. 41–46). Section 201(f) proscribes unauthorized gifts or fees given "for or because of" official acts. See *United States* v. *Irwin*, 354 F. 2d 192, 196 (C.A. 2), petition for certiorari pending, No. 1017, this Term. It does not in terms require that the payment be made with a corrupt intent to influence a government employee's acts. Nor is there reason to read such a requirement into the statute. Since Congress explicitly included the element of improper intent in other offenses defined under Section 201, which carry a heavier penalty, it is evident that Congress designedly omitted it from subsection (f). The statute thus penalizes all gifts related to official acts as a prophylactic measure against the possibility of improper influence. Congress unquestionably has the power to prevent the dangers inherent in giving gratuities to government employees. If nothing more, the statute gives notice with unmistakable clarity that the type of payments made in this case are prohibited. *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32–33; *United States* v. *Raines*, 362 U.S. 17, 21; *United States* v. *Harriss*, 347 U.S. 612, 617.

The trial judge therefore properly charged the jury that the government, to establish the violation of Section 201(f), had to prove only that payments were made wilfully and knowingly "for or because of the performance of the audit examination of the returns

in question."[7] And, as the court of appeals determined (Pet. App. 8), the evidence "leaves no room for any other conclusion than that the payments were made for the pretended audits."

5. Petitioner contends (Pet. 35–41) that he cannot be guilty of aiding and abetting the violation of 26 U.S.C. 7214(a)(2) because the conduct of the revenue agents did not itself constitute a violation. Section 7214(a)(2), he maintains, is limited in its application to employees who knowingly demand other or greater fees than are authorized by law, whereas the revenue agents here were authorized to collect no fees whatever. However, petitioner mis-

[7] This portion of the charge was as follows (I R. 37):

"Under this second group of crimes charged, namely, Counts 12, 15, 16, 17, 20, 21 and 22, the Government must prove each of the following elements beyond a reasonable doubt with regard to each count in this group.

"Those elements are, one, that the defendant did give a sum of money to the agent named, that is, Clyne or Coady or Deitsch. Two, that this money was given otherwise than as provided by law for the proper discharge of the official duties of such employee; and, three, that this money was given for or because of official acts performed or to be performed by the said employee, to wit, the official audit examination of the income tax returns therein described.

"It must be readily obvious to you that there is in these elements for the second group no need for the government to prove that the payment of money was with a corrupt intent to influence the employee, but rather only to prove that the defendant paid the money wilfully and knowingly, that is, intentionally, as distinguished from inadvertently or negligently; and that such moneys were not required by law to be given, but were given for or because of the performance of the audit examination of the returns in question."

inteprets the statute for it encompasses not only an employee who demands excessive fees but it also covers an employee who "receives any fee, compensation, or reward, *except as by law prescribed*, for the performance of any duty" (emphasis added). Furthermore, the initial language of Section 7214(a)(2)—"Any officer or employee of the United States acting in connection with any revenue law of the United States" (language which the court of appeals noted (Pet. App. 9) was broadened by amendment in 1954)—reaches all employees, not merely those authorized to charge a fee.[8] The revenue agents here were receiving compensation otherwise than prescribed by law for the auditing of these returns. Petitioner's payment of that compensation constituted aiding and abetting the offense. *May* v. *United States*, 175 F. 2d 994, 1004 (C.A.D.C.).[9]

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[8] In *United States* v. *Gerdel*, 103 F. Supp. 635 (E.D. Mo.), cited by petitioner (Pet. 39), defendant was tried without a jury on an agreed statement of facts. Emphasizing the burden of proof resting on the government, the court expressed grave doubts that home assistance to a taxpayer in the preparation of his income tax return by an internal revenue employee, for which a modest fee was charged, constituted "acting under the authority of any revenue law of the United States." The further reasoning, based upon the penalty provision, stressed by petitioner, was secondary.

[9] Petitioner's additional contention (Pet. 32–35), that two of the five counts based on Section 7214(a)(2) were barred by limitations, is not significant in view of the equal concurrent sentences imposed. *Lawn* v. *United States*, 355 U.S. 339, 359, 362. Moreover, if petitioner's conviction is sustainable on either 18 U.S.C. 201(f) or 26 U.S.C. 7214(a)(2), further review is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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